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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 TRUMAN CAPITAL ADVISORS LP, et  
4 al,

Plaintiffs,

5 v.

13 CV 5945

6 NATIONSTAR MORTGAGE LLC,

7 Defendant.  
8

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9 New York, N.Y.  
10 August 7, 2014  
11 11:15 a.m.

Before:

12 HON. NAOMI REICE BUCHWALD,

13 District Judge

14 APPEARANCES

15 MICHELMAN & ROBINSON  
16 Attorneys for Plaintiffs  
17 ROBERT PILIERO, ESQ.

18 BUCKLEY SANDLER  
19 Attorneys for Defendant  
20 MATTHEW PREVIN, ESQ.  
21 ROSS MORRISON, ESQ.  
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23  
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(Case called)

(In open court)

THE DEPUTY CLERK: 13 Civ. 5945, Truman Capital Advisers v. Nationstar Mortgage. Is plaintiff's counsel present and ready to proceed?

MR. PILIERO: Yes, we are. Robert Piliero, from Michelman & Robinson. With me is Rob Ontell, same firm.

MR. PREVIN: Matthew Previn from Buckley Sandler.

MR. MORRISON: Robert Morrison from Buckley Sandler.

THE COURT: I have a few questions, maybe that's a good way to begin. Just as a matter of fact, was the loan sale agreement ever sent to Truman Capital by anyone?

MR. PILIERO: Yes, your Honor. It was sent by the agent, Auction.com, and it was sent back by Truman Capital.

MR. PREVIN: Excuse me, your Honor. We disagree with that. I'm not sure what loan sale agreement counsel is referring to.

THE COURT: I can tell you what I'm referring to. I don't know what he's referring to. In the auction terms there is, page 2 in the section entitled "bidding and winning," a sentence that says, "Once contacted by an auctioneer representative the winning bidder will be sent by e-mail the loan sale agreement and certain other documents for electronic signature unless otherwise directed by seller." That's what I'm referring to.

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1 MR. PILIERO: That's what I was referring to as well  
2 and that did occur. There were two notices for different  
3 tranches of two different pools where we were notified that we  
4 were the winning bidder, and along with that, on the first  
5 loan, the loan sale agreement was sent. We signed it, sent it  
6 back and then it fell apart because of that KIRP litigation,  
7 the state court litigation you read about.

8 THE COURT: So the second one --

9 MR. PILIERO: I don't know if they sent it or not, but  
10 the timing was such it became moot because the ruling was  
11 issued by the Judge Branson in the KIRP case. By the way, that  
12 TRO was subsequently dissolved in two or three weeks.

13 MR. PREVIN: Your Honor, if I may. There's nothing in  
14 the complaint about this at all. The only allegation in the  
15 complaint is that the auctioneer sent an e-mail to plaintiffs  
16 notifying them they were the winning bidder. There was no  
17 allegation at all about sending a loan sale agreement.

18 THE COURT: That's why I asked.

19 MR. PREVIN: I haven't seen a loan sale agreement.  
20 I'm not aware of any loan sale agreement having been sent. The  
21 opposition papers submitted by counsel argues that the e-mail  
22 itself constituted a loan sale agreement. This is entirely new  
23 to me.

24 THE COURT: I'm not positive what they argued. I  
25 certainly think they argue that it was a contract, that the

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1 e-mail created a contract.

2 MR. PILIERO: But there's a real fine line distinction  
3 if I may make, okay? We're not saying that the loan sale  
4 agreement is the contract, okay?

5 THE COURT: Okay.

6 MR. PILIERO: What we're saying is the following. And  
7 it's a bit -- we didn't draft the contract and you've got to  
8 step through it a little bit. What we're saying is, and this  
9 is what Mr. Previn has been saying in his papers, that the  
10 auction terms were binding on the bidders. We agree, they  
11 were. We say that they were also binding on the seller, on  
12 Nationstar. That made the auction terms a binding, enforceable  
13 contract with respect to the auction process. Not with respect  
14 to the terms and conditions of the sale of the notes, but with  
15 respect to the auction process. And what we're saying is, when  
16 the Court interprets the contract that is the auction terms --  
17 and I can go through all the details -- we believe it is  
18 inescapable that because of the way Nationstar handled the  
19 bidding process -- and I can walk you through it -- a binding  
20 contract to sell the notes occurred. It was not the loan sale  
21 agreement, okay? It was a contract and I can point you to the  
22 language in the auction terms that gives you the dichotomy, if  
23 you will, of the disjunctive, a contract of sale or the loan  
24 sale agreement.

25 So what am I saying?

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1 THE COURT: Well, you tell us.

2 MR. PILIERO: I'd kind of like to do it in an orderly  
3 way. I don't know if I can or not. I don't want to step on  
4 his lines, but I want to answer your questions. But there's a  
5 way to build to it so that it makes sense, that it obviously  
6 makes sense and it really is a question of contracts 101 in  
7 terms of issue. One is bilateral contract versus unilateral  
8 contract. If the auction terms are viewed as a contract it  
9 must be viewed as a bilateral contract because it's a promise  
10 for a promise. A unilateral contract would require separate  
11 consideration to be given by Nationstar to the bidders. Their  
12 position on this, in this case and in this motion, is that all  
13 the bidders plunkedd their money down to register, conducted an  
14 enormous amount of due diligence -- in the due diligence vault,  
15 plus on their own which they were required to do under the  
16 terms -- they went through three, four, five days of bidding,  
17 they went and hired people to figure out -- remember, this is  
18 buying mortgage notes. You've got to find out what the value  
19 is by looking at the property. So they hire brokers to go say  
20 that property is worth this, that property is worth that, this  
21 is what your bids ought to be. They go through that with  
22 hundreds and hundreds of loans.

23 At the end of the day, according to Nationstar's  
24 position, it gets to say "never mind."

25 THE COURT: Isn't that exactly, though, what the

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1 auction terms say?

2 MR. PILIERO: No. I'll tell you why. I have the --  
3 maybe your vision is better than mine. I blew one up.

4 THE COURT: You know what, my contacts are very good,  
5 so I'll use mine. I'll give you my source for the contacts.

6 MR. PILIERO: Very good, Judge. If you look at the  
7 section that says "bidding and winning," okay --

8 THE COURT: Why don't we start, though, at the  
9 paragraph that says "reserve auction" in the second sentence  
10 which says, "The starting bid is not the reserve price. In  
11 order to be the winning bidder for the note the bidder must  
12 meet or exceed the reserve price and the bid must be accepted  
13 by the seller. See subject confirmation section below," and  
14 when you look at the subject confirmation section, it says,  
15 "The winning bidder acknowledges and agrees that winning  
16 bidder's purchase price is subject to and contingent upon the  
17 seller approving the purchase which shall be given or denied at  
18 their sole and absolute discretion within five business days  
19 following the close of the auction and execution of the loan  
20 sale agreement by the winning bidder."

21 So doesn't that say that the seller has five days to  
22 let the winning bidder know if they've accepted the bid?

23 MR. PILIERO: Respectfully, no.

24 THE COURT: It seems to say that.

25 MR. PILIERO: I know. Let me explain why. The

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1 section in which that appears is called subject to  
2 confirmation. And it begins, and therefore the entire  
3 paragraph relates to, "In the event the winning bid amount is  
4 not immediately accepted by the seller," okay? It only applies  
5 if there was not an immediate acceptance by the seller. How do  
6 we know what's accepted? It goes on to say -- how do we know  
7 it's not accepted? It says, "In the event the winning bid is  
8 not accepted the auctioneer will inform the winning bidder that  
9 acceptance of their winning bid is subject to confirmation."  
10 That's what precedes the language --

11 THE COURT: But that's inconsistent. Because under  
12 the auction terms the winning bidder has two hours to accept --  
13 to say, yes, I agree to be the winning bidder, but this  
14 provision gives the seller five days to in its sole discretion  
15 reject or accept the --

16 MR. PILIERO: I have a different reading of it. I  
17 have a reading of it that that is exactly true and the position  
18 is exactly true that the seller gets to say I don't accept your  
19 bid, only if its agent Auction.com says you're the winning  
20 bidder, but it's subject to confirmation.

21 THE COURT: But the auctioneer and the seller are two  
22 different entities.

23 MR. PILIERO: But --

24 THE COURT: And that's quite clear throughout the  
25 terms because there are points where there's an actual sort of

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1 dichotomy. They aren't mushed into one.

2 MR. PILIERO: I understand and that kind of reinforces  
3 respectfully what I'm saying. Going back to that first  
4 sentence of "subject to confirmation," the auctioneer is the  
5 one who designates the Winning Bidder; capital W, capital B.  
6 The auctioneer does that and he does that in order to signify  
7 whether or not the winning bid was or was not immediately  
8 accepted by the seller. How does he signify acceptance by the  
9 seller, which of course is the last step in the formation of  
10 the contract? He does it in the negative; you won the bid,  
11 that means you met all the prices, beat the reserve prices, you  
12 beat everybody else, you're the winning bidder, but it's  
13 subject to confirmation. If you do that then we get to buy the  
14 stuff. If they don't do that --

15 THE COURT: If as a matter of historic fact it turned  
16 out, leave aside all this discussion, the auctioneer failed to  
17 call the seller and say do you accept this --

18 MR. PILIERO: There's no actual record that says this,  
19 Judge. That didn't happen. It works the other way. If you're  
20 the winning bidder the deal is accepted unless they  
21 affirmatively say it's --

22 THE COURT: Then you have to, then the auctioneer  
23 would have an obligation to contact the seller and get their  
24 permission. Otherwise you've made the auctioneer the same as  
25 the seller for purposes of proceeding with the deal. The



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1 auctioneer is not the seller.

2 MR. PILIERO: Two answers to that, Judge. One is, we  
3 don't know whether or not the auctioneer did or did not call  
4 the seller. We don't know whether he did or not. We don't.

5 THE COURT: But this isn't a situation if -- just  
6 logical. If the auctioneer had called the seller and the  
7 seller said, "Fine with me," and then there was this state  
8 court action TRO that got lifted, presumably the seller would  
9 have continued to say, "Fine with me, they're yours."

10 There seemed to be two theoretical reasons that the  
11 seller would after this whole process say no. One has to do  
12 with this state court case which doesn't actually I think  
13 affect all of the mortgages, correct?

14 MR. PILIERO: Correct.

15 THE COURT: It's only a portion. So that wouldn't  
16 have prevented the deal going through, at least in part. The  
17 other reason, just sort of logical, would be the bids on this  
18 pool of mortgage notes were so high and there were so many of  
19 them that the seller says to themselves, you know, we kind of  
20 mispriced this. We could do a lot better, and they say let's  
21 pull it and do it again.

22 But that reason would, if that were really what  
23 happened, and of course I have absolutely no idea what happened  
24 here, then the seller would never have said to the auctioneer  
25 accept this bid, because they would have realized right up

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1 front, like, we priced our house, you know, we got a bidding  
2 war on the house, we really priced it too low to sell. So it  
3 just doesn't sort of logically work that the auctioneer really  
4 got permission from the seller to go ahead.

5 MR. PILIERO: See, but, if I may, you are, I believe,  
6 flipping the construct. The contract that their side drafted  
7 did not say the auctioneer will get approval from the seller  
8 and then tell you that it's a good deal and you're the winning  
9 bidder and you can buy it. It doesn't say that. What it says  
10 is that the seller has authorized the auctioneer to declare the  
11 winning bidder, doesn't say anything about getting approval  
12 from the seller --

13 THE COURT: Wait a minute. It sure does. If you go  
14 on to page 5, I think it couldn't be much clearer. "No  
15 obligation to sell shall be binding on seller unless and until  
16 a written contract of sale or loan sale agreement is signed and  
17 delivered by seller."

18 MR. PILIERO: Judge, I got that.

19 THE COURT: Right?

20 MR. PILIERO: I got that, and if I had drafted the  
21 contract that you had you wouldn't have the inconsistencies  
22 that this contract has.

23 THE COURT: I think that where -- I understand.

24 MR. PILIERO: Let me put it a different way, if I may.  
25 Basic principle of contract construction is you've got to give

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1 effect to all the terms. Right?

2 THE COURT: Okay.

3 MR. PILIERO: What do we do with the term that says in  
4 the event the winning bid amount is not immediately accepted by  
5 the seller -- you don't need that. If the only trigger to an  
6 obligation to sell the notes was a signed sale agreement you  
7 don't need that provision, you don't need bidding and winning,  
8 you don't need half the provisions in this contract because  
9 it's all covered. That's all surplusage. I believe the law is  
10 that we're supposed to find a reason and harmonize all the  
11 provisions in the contract and, respectfully, these provisions  
12 have no place in this contract if in fact the only trigger to a  
13 sale obligation was to sign the loan sale agreement. I believe  
14 that.

15 Number two, I also believe that the notion of all the  
16 penalties that they can impose, specific performance,  
17 liquidated damages, everything else, for a default, what does  
18 that connote? A default on what? A default on a contract.  
19 You can't impose penalties unless you have a contract. So  
20 there is a contract that they entered into, which is the  
21 auction terms. And the contract says that if I don't buy, if I  
22 don't buy the notes --

23 THE COURT: That just can't be right.

24 MR. PILIERO: Judge, we wouldn't have drafted it this  
25 way for sure. But at a minimum -- well, I believe it's clear,

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1 but I understand you think it's clear the other way. At a  
2 minimum --

3 THE COURT: The question is, I think, or a way to kind  
4 of think through this, is which of the provisions in the  
5 auction terms are the ones that are clearest in sort of like  
6 one syllable. Which are what one might call the black letter  
7 provisions, the ones that are most declarative, easiest to  
8 understand, the ones in English, the ones that don't require  
9 intelligent lawyers interpreting them. And it seems to me  
10 that, this is, you know, my current thinking, is that there are  
11 four provisions that are not by themselves subject to  
12 interpretation, that all speak to the seller having a bottom  
13 line right to accept the bid, to not be bound, unless and until  
14 the seller does certain things. And I think that your  
15 arguments are sort of more nuanced. I'm not saying they're,  
16 like, crazy.

17 MR. PILIERO: I'm saying the same thing you are.  
18 Focusing on until the seller does certain things. The first  
19 sentence of the section "subject to confirmation" tells us one  
20 way in which the seller does certain things. You're focusing  
21 on the other way, the loan sale agreement. This one says the  
22 way the seller focuses is by having the auctioneer tell the  
23 bidder when it says you're the bidder, when it says you're the  
24 winning bidder, the seller gets to say never mind if it says  
25 it's subject to confirmation.

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1           THE COURT: But you go back and go to the reserve  
2 auction provision on page 2 which says not only must a bidder  
3 meet or exceed the reserve price and the bid must be accepted  
4 by the seller, it doesn't say accepted by the seller or the  
5 auctioneer. The seller being subject to confirmation has the  
6 sole discretion to --

7           MR. PILIERO: Can I interrupt you?

8           THE COURT: -- has the sole discretion to either  
9 approve or reject the contract individually with respect to  
10 each loan. You have the five-day provision and you have the no  
11 obligation to sell shall be binding on the seller unless and  
12 until there's a written contract of sale or loan agreement is  
13 signed and delivered by the seller. It doesn't give the  
14 auctioneer a right to deliver a contract. And if we're going,  
15 if you want to argue that, and I don't think it really works,  
16 but I understand your argument that the auction terms do create  
17 certain obligations, certain behaviors, but I don't think  
18 that's the same thing, and you're not arguing that it is the  
19 same thing as being an actual contract of sale.

20           MR. PILIERO: Can we agree, your Honor, that the  
21 auctioneer is the seller's agent for purposes of conducting the  
22 auction? It says it in the auction terms.

23           THE COURT: I think that's kind of what an auctioneer  
24 is.

25           MR. PILIERO: So anything that the auctioneer does in

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1 connection with the auction is within the scope of its  
2 authority as an agent.

3 THE COURT: No, not necessarily.

4 MR. PILIERO: Okay.

5 THE COURT: Look, the whole point -- let me ask it  
6 another way. If this instead of being called a reserve auction  
7 had the title conditional auction we wouldn't even be here,  
8 right?

9 MR. PILIERO: I disagree. It depends on what the  
10 terms say.

11 THE COURT: Conditional auction means that in the end,  
12 bottom line, the seller can walk away. Right? After the whole  
13 process. I mean, there's always going to be an auction  
14 process. Whether it has five --

15 MR. PILIERO: But you'd never have a conditional  
16 auction with a reserve auction. Those two are inconsistent.

17 THE COURT: Isn't it the point that the language in  
18 these auction terms makes it effectively a conditional auction  
19 even though it has the word "reserve auction"?

20 MR. PILIERO: Judge, that's why it's an oxymoron.  
21 There were reserve prices. The seller didn't have to say it's  
22 okay. There were reserve prices for every piece of property.  
23 \$500,000, \$300,000, the bid was ineligible unless it exceeded  
24 the reserve price. That was the condition. What it says is,  
25 you use the word "condition," Judge?

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1 THE COURT: They also say, there is -- it's an  
2 unpublished reserve price.

3 MR. PILIERO: That's the whole idea. Otherwise you  
4 know what you're bidding against. The whole idea of an  
5 auction --

6 THE COURT: That's not true. You can have minimum  
7 bids and say we're not -- the minimum bid has to be  
8 \$20 million.

9 MR. PILIERO: That's a minimum bid, with all due  
10 respect is different from a reserve auction. Minimum bid is  
11 saying don't bid less than \$5, a reserve auction is we're not  
12 selling for less than \$5,000. It's two different things.

13 THE COURT: It amounts to the same thing.

14 MR. PILIERO: Not in this case.

15 THE COURT: Don't bid unless you can bid \$5 is the  
16 same thing as saying I'm not selling this to you for less than  
17 \$5. There's no real difference.

18 MR. PILIERO: With all due respect, the opening bid,  
19 this is kind of aside, but the opening bid requirement is to  
20 insure that there's a real auction process, okay? It just  
21 means that you don't want jerks coming in here and bidding  
22 \$1.50. The other one is different.

23 Can I say one thing? You said it before, Judge, and I  
24 just want to focus on it. You juxtaposed two very, very  
25 important things, okay? In the reserve auction section, the

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1 third sentence, "In order to become the winning bidder for a  
2 note, a bidder must meet or exceed the reserve price and the  
3 bid must be accepted by the seller, see subject to  
4 confirmation."

5 So go to subject to confirmation and it talks about  
6 accepted by the seller. Okay? If the winning bid is not  
7 immediately accepted by the seller the auctioneer must say  
8 subject to confirmation. The negative pregnant of that is that  
9 if the auctioneer says you're the winning bidder but does not  
10 say it's subject to confirmation, you've got a deal.

11 THE COURT: Except that --

12 MR. PILIERO: Except for the other provision.

13 THE COURT: Just keep reading.

14 MR. PILIERO: Sorry.

15 THE COURT: You still have the five days.

16 MR. PILIERO: No, Judge, that only applies -- I'm  
17 sorry, I hate to be so contrary. The whole paragraph is called  
18 subject to confirmation. That sentence that you focused on  
19 with the five days only applies if the auctioneer had said it's  
20 subject to confirmation, then the seller has got five days to  
21 do something. It doesn't apply unless they've said subject to  
22 confirmation.

23 THE COURT: But the implicit sort of reality of your  
24 reading this as suggesting that the auctioneer effectively  
25 binds the seller if the auctioneer doesn't include in the



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1 you're the winning bidder e-mail the word "subject to  
2 confirmation," that assumes that the auctioneer did his job and  
3 contacted the seller, who said it's fine. And that is totally  
4 inconsistent with the fact that the seller didn't say it's  
5 fine.

6 MR. PILIERO: But you're supplying that, with all due  
7 respect.

8 THE COURT: But it's logical. Because otherwise  
9 you're giving the auctioneer --

10 MR. PILIERO: You could have drafted it that way.

11 THE COURT: -- a power that is rather extraordinary.  
12 Because this is not a situation in which if the auctioneer  
13 screws up Nationstar can sue him for the damages that were  
14 caused by his agreeing to sell Nationstar's property to you.

15 MR. PILIERO: There's two things, though, Judge. I  
16 believe and you disagree and that's okay, you're the judge. I  
17 believe that the construct says that the seller did give the  
18 auctioneer the authority --

19 THE COURT: Why would they now say no?

20 MR. PILIERO: May I finish? Please? Did give them,  
21 did give them the authority to bind it by drafting this  
22 language which says -- you don't buy that?

23 THE COURT: I can't buy it because of all the other  
24 language that gives the seller --

25 MR. PILIERO: Then this provision means nothing. What

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1 do we do with this provision, throw it away?

2 THE COURT: Sometimes contracts aren't perfect. But  
3 the point is your clients are very sophisticated folks and they  
4 are also charged with reading the entire document, and there  
5 are multiple places in this document where it's reserved to the  
6 seller the ultimate say-so yea or nay and it seems to me, as I  
7 read it, that that should have been quite clear.

8 MR. PILIERO: If I may, and I'm not going to beat the  
9 horse. The horse is dead and on the way to the glue factory, I  
10 understand that. But let me just make one more observation.  
11 In the subject to confirmation section, that is certainly  
12 contradicted -- let me put it this way. Your Honor is  
13 assuming, your Honor is assuming either this provision should  
14 be ignored or if this provision counts your Honor is assuming  
15 that the winning bidder did not go to Nationstar and say okay  
16 to give it to Truman?

17 THE COURT: The auctioneer.

18 MR. PILIERO: The auctioneer, the auctioneer didn't  
19 go, because maybe it did. I don't have the facts yet. If it  
20 did, would that change your position? If the auctioneer went  
21 to Nationstar and said Truman got a great deal above the  
22 reserves, let's do it.

23 THE COURT: Why would it make any sense?

24 MR. PILIERO: Because --

25 THE COURT: This is business. This is about making

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1 money.

2 MR. PILIERO: I have a theory. Do you want me to tell  
3 you the theory?

4 THE COURT: Yes.

5 MR. PILIERO: For a mortgage servicer to sell  
6 non-performing loans is very, very unusual. There happened to  
7 be a provision in this master servicing agreement that allows  
8 it. Why was it unusual? Because it results in a situation  
9 where the note holder, because these are all packaged. The  
10 note holders don't maximize their recovery when the Nationstars  
11 of the world sell it this way. The way they -- the way they  
12 maximize the recovery, okay, is to have them go through the  
13 foreclosure process and to have a complete foreclosure sale,  
14 but that costs Nationstar money to do that. They've got to  
15 continue to service non-performing loans and spend the money on  
16 a foreclosure, okay? So what they do is they do this auction,  
17 people like KIRP, who own the mortgages, say you can't get away  
18 with this stuff, you're disadvantaging us with respect to the  
19 ultimate value of our notes. Nationstar took a shot, KIRP  
20 thought about it, KIRP said, you know what, Quinn Manuel is  
21 representing KIRP, Quinn Manuel says I've got KIRP right now  
22 but I have 50 others right now who also don't like the idea  
23 you're taking money out of the note holders' pockets.

24 So you want a logical explanation for why they didn't  
25 want to go forward with this? They didn't want a billion

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1 suits. They said let's disadvantage Truman, let's move on.  
2 They're not doing it anymore. Why aren't they doing do it  
3 anymore? Because it became a bad business judgment. I don't  
4 know everything about the industry, but there's lots of reasons  
5 we can't fathom or we certainly don't know that might be why  
6 Nationstar, said, hey, even though this is business, I better  
7 not be selling these, I better go back to my knitting and  
8 service them. We don't know this until discovery.

9 By your interpretation, Judge, it is critical to know  
10 whether or not Nationstar approved this sale.

11 THE COURT: I'm only reacting to what your --

12 MR. PILIERO: I'm shouting. I'm sorry, Judge.  
13 Forgive me.

14 THE COURT: It's all right. There's a lot of money at  
15 stake.

16 MR. PILIERO: I think at a minimum it's an ambiguous  
17 contract. I believe.

18 THE COURT: Let me say in focusing on the subject to  
19 confirmation provision I am more reacting to what you're  
20 arguing and pointing out why I don't think it's as strong an  
21 argument as you think it is. More than simply relying on that  
22 by itself I think that as I pointed out I think there are four  
23 parts of this contract which receive little red stars on my  
24 marked up version that speak to this reservation on the part of  
25 the seller to make the final judgment as to whether it wishes

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1 to go through with this deal or not.

2 But let me ask, because they've gotten off easy,  
3 the --

4 MR. PILIERO: Please.

5 THE COURT: Nationstar's counsel, the plaintiff argues  
6 that the contract has to be bilateral. So what obligation do  
7 you accept or maintain that you had as seller after the  
8 plaintiff was declared the winning bidder?

9 MR. PREVIN: Your Honor, I think the terms, the  
10 auction terms made quite clear that at that point the seller,  
11 Nationstar, has the obligation to consider the bid, the winning  
12 bid and choose whether or not to submit a loan sale agreement  
13 to the winning bidder.

14 Just going back for just a moment, I think your Honor  
15 is correct that this is functionally a conditional auction.  
16 There's no conflict between a reserve auction and a conditional  
17 auction, there are just multiple conditions. The auctioneer in  
18 a conditional auction is without authority to accept and create  
19 a binding contract. All the auctioneer can do is to designate  
20 who the winning bidder is and then it's up to the seller to  
21 decide whether or not to submit a loan sale agreement and it's  
22 very clear in the contract what the contours of that loan sale  
23 agreement have to be and it's certainly not an e-mail notifying  
24 the winning bidder that it has won the auction, that it  
25 submitted the winning bid. So I would submit, your Honor, that

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1 once the winning bid e-mail has gone out it is incumbent on the  
2 seller to choose whether or not to consider the bid in good  
3 faith and elect whether or not to submit a loan sale agreement.

4 THE COURT: Would you accept the notion that if there  
5 is a winning bidder that that would preclude Nationstar from  
6 considering bids from anyone else, that you're in a position of  
7 accepting or rejecting the winning bid, but you can't deal with  
8 another bidder?

9 MR. PREVIN: I think obviously that's going a little  
10 beyond the facts here, but one could construct that argument  
11 that you could potentially read into this that there's a  
12 potential good faith obligation not to turn around and sell to  
13 anyone else. But it's very clear in the contract that the  
14 seller reserves the right not to sell the loans at all and not  
15 to submit a loan sale agreement.

16 If you look back, your Honor, to the section you  
17 directed us to, the bidding and winning section of the auction  
18 terms, it's plain as can be this is a multistep process. It  
19 begins with an auction, the auctioneer designates who the  
20 winning bidder is and I'm midway through the bidding and  
21 winning paragraph. Let me start with the second sentence, if I  
22 may. "To purchase a particular note at the auction one must be  
23 acknowledged by the auctioneer as the winning bidder." That's  
24 step one. "Then if you are the winning bidder you will be  
25 contacted by phone by an auctioneer representative at the phone

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1 number you provided. Once contacted by the auctioneer  
2 representative," so now we're moving on to the next step, "the  
3 winning bidder will be sent by e-mail the loan sale agreement  
4 and certain other documentation for electronic signature." So  
5 that's step two.

6 Then you skip down to the last sentence of that  
7 paragraph, "After executing a loan sale agreement which shall  
8 be executed within two hours of auctioneer's acknowledgment of  
9 the winning bid," so it's clear those are two different things.  
10 Winning bidder will be contacted by an escrow closing agent or  
11 settlement attorney who will provide them certain additional  
12 information pertaining to a closing process. All of those  
13 steps have to take place before there's a final deal.

14 So I'm not sure if I answered your Honor's question,  
15 but I think that the contract is very clear that the  
16 auctioneer -- that the seller reserves the right not to proceed  
17 with the sale until all of those steps have been completed.

18 MR. PILIERO: I can't resist, I'm sorry.

19 THE COURT: Please.

20 MR. PILIERO: You asked him, in a bilateral contract  
21 what's the promises that Nationstar made? What came back was  
22 we'll consider the bid and we'll choose whether to go forward  
23 with the sale. So that's their promise, okay? Now look at our  
24 promise, okay, and how do we look at our promise? Let's look  
25 at it in terms of the remedies if we don't honor our promise to

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1 purchase. And the remedies are specific performance and  
2 liquidated damages. Respectfully, is it rational to assume  
3 that there would be a contract, a bilateral contract where one  
4 party says I'll think about selling you the notes, and the  
5 other party says I promise I will buy the notes and I'll pay  
6 you a fortune if I don't. That's either an illusory contract,  
7 which isn't a contract and therefore not enforceable --

8 THE COURT: Why would that be any different from a  
9 conditional auction?

10 MR. PILIERO: Because, with all due respect, we're  
11 implying the notion it's a conditional auction. It's not.  
12 It's a reserve auction.

13 THE COURT: But if you want to argue it's grossly  
14 unfair and therefore it can't be construed that way, isn't a  
15 proper response to that the gross unfairness that you're  
16 pointing to is effectively a conditional auction which is a,  
17 it's sort of a one-sided deal. This was actually a kind of  
18 one-sided arrangement.

19 MR. PILIERO: I'll warrant, your Honor, there's never  
20 been a conditional auction that had a specific performance  
21 obligation on the part of the buyer. It is indeed a one-sided  
22 contract, a one-sided arrangement. It's just one-sided. It  
23 says, I have to decide whether to give it to you. It doesn't  
24 say but if you weasel out on me you pay me a fortune. That's  
25 not a conditional auction, that's a reserve auction, that's



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1 what this auction is and it's respectfully a bilateral contract  
2 that is very badly drafted, very badly drafted. At best it's  
3 ambiguous.

4 I believe that given the way the auctioneer is the  
5 agent and given all the other things we've spoken to, I think  
6 the way to harmonize all the provisions and the only way to  
7 follow the contract interpretation principle giving effect to  
8 all the provisions is the way in which we suggested, which is  
9 to look at the language as contract of sale or loan sale  
10 agreement and you still have the problem and I give it to you,  
11 that it's not signed by the seller and the auctioneer is not  
12 the seller. Again, it's not clean. And I didn't draft the  
13 contract. At most, as I say, it's ambiguous, it cuts both  
14 ways. But it makes no sense to me to say that on the one hand  
15 I'll think about it, on the other hand you owe me a fortune.

16 THE COURT: You're just talking sort of more like  
17 broad equities.

18 MR. PILIERO: I know.

19 THE COURT: Does it make sense to compel a party to  
20 sell something that they have decided that they don't want to  
21 sell in favor of giving the judgment to a company who believes  
22 that they got a good deal and that they would in the future  
23 make money from that? That's a theoretical windfall -- it may  
24 not be a windfall, but it's a future prospective economic  
25 advantage versus compelling someone to sell when there's a

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1 document which over and over again says you can't compel us to  
2 sell, we retain the right not to do so. At most, and I don't  
3 know that it would work, but at most some equity balance might,  
4 might, but I don't think it works, to say, well, we expended X  
5 dollars preparing this bid, we should be compensated for that  
6 because, you know, your document wasn't clear enough that this  
7 might be, you know, a fool's errand. But the reality is  
8 everybody else that bid, who didn't put in the winning bid in  
9 the sense suffered the same expenditures in terms of preparing  
10 the bid.

11 MR. PILIERO: That's also -- with all due respect,  
12 that's also outside the record. We don't know whether or not  
13 Nationstar paid any of the expenses for those, those due  
14 diligence expenses. We don't know that. There were a lot of  
15 other bidders. No, no. You're assuming we were the only  
16 winning bidder. There were a lot of winning bidders.

17 THE COURT: I'm assuming that a whole bunch of folks  
18 participated in this auction, that you were not the only  
19 bidder. All I'm suggesting is that participating in an auction  
20 like this does, as you indicated, involve a certain amount of  
21 effort. It's not just a, you know, like a thought process when  
22 Sotheby's puts a piece of art up for sale and some rich guy  
23 says how much do I want to part with my millions to buy this,  
24 he might do a little research to find out what the market is  
25 for Picassos that are similar or whatever. But you're saying

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1 that there was a lot more due diligence efforts. I'm just  
2 suggesting that anybody that bid in this auction presumably  
3 went through the same type of due diligence to justify the bid  
4 that they made. But they all took a risk that they might not  
5 win and if you aren't the winning bidder those expenses were  
6 down the drain in any event.

7 MR. PILIERO: All I'm suggesting is that they did not  
8 take the risk that they would be the winning bidder and still  
9 not get the notes. That's not the risk they take.

10 THE COURT: Well, sometimes, you know, you fudge it.

11 All right. Okay. Go you want to say anything else?

12 MR. PREVIN: No, your Honor, we think you understand  
13 the contract.

14 THE COURT: All right. We'll give if this some more  
15 thought and issue a written decision.

16 MR. PILIERO: Thank you very much for your time,  
17 Judge.

18 (Adjourned)